RAZALI BIN AHMAD v. PUBLIC PROSECUTOR

[F.C. (Lee Hun Hoe C.J. Borneo, Salleh Abas & Abdul Hamid F.JJ.) February 17 & March 23, 1981]

[Kuala Lumpur — Federal Court Criminal Appeal No. 13 of 1980]

Criminal Law and Procedure — Possession of pistol and ammunition — Trial under Essential (Security Cases) Regulations, 1979 — Whether regulations validated — Subsidiary legislation — Interpretation Act, 1967, s. 3 — Emergency (Essential Powers) Act, 1979, s. 9(1).

Interpretation of Statutes — Definition of "subsidiary legislation" — Whether applicable to Emergency (Essential Powers) Act, 1979, s. 9(1) — Interpretation Act, 1967, s. 3.

This was an appeal from the conviction of the appellant for the offences of having in his possession a pistol and ammunition. He had been tried under the provisions of the Essential (Security Cases) Regulations, 1979 as amended. One of the questions raised on the appeal, was whether the Essential (Security Cases) Regulations, 1979, were effectively validated by the Emergency (Essential Powers) Act, 1979. It was argued that in view of the definition of "subsidiary legislation" in section 3 of the Interpretation Act, 1967, only those regulations having the force of law were validated by section 9(1) of the Emergency (Essential Powers) Act, 1979.

Held: section 9(1) of the Emergency (Essential Powers) Act, 1979 specifically refers to subsidiary legislation "made or purported to be made under the Emergency (Essential Powers) Ordinance, 1969 on or after February 20, 1971 and these must include the Essential (Security Cases) Regulations which were therefore validated by the Act.

Cases referred to:-

(1) *Teh Cheng Poh* v. *Public Prosecutor* [1979] 1 M.L.J. 50 P.C.

(2) *Teh Cheng Poh* v. *Public Prosecutor* [1979] 2 M.L.J. 238 F.C.

(3) *Phang Chin Hock* v. *Public Prosecutor* [1980] 1 M.L.J. 70.

FEDERAL COURT.

Subash Chandran for the appellant.

Shaikh Daud bin Haji Mohamed Ismail (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the judgment of the Court): The appellant was convicted of two offences under section 57(1)(a) and (b) of I.S.A. 1960, for having in his possession a pistol and 88 rounds of ammunition. The conviction was based on the evidence of two prosecution witnesses PW6 and PW7. On February 22, 1977 a bus stopped at a road block at Kodiang, Kedah. PW7 one of the police constables manning the road block went to guard the entrance of the bus whilst his superior Corporal Ayob (now dead) entered the bus to examine the passengers. There were about 30 passengers in the bus and the appellant who was one of them was seated alone in a seat which was a third row counted from the back of the bus. Corporal Ayob examined the passengers one by one and when he came to the appellant he said that there was someone carrying a dangerous weapon. So saying, he took the appellant down whilst the bus and the rest of the passengers continued the journey. The appellant was then carrying a dark blue bag. He was taken to the guard room where his bag was examined in his presence. Among the contents of the bag the pistol and 88 rounds of ammunition, the subject-matter of the two charges against him were found.

Counsel for the appellant attacked the findings of the learned judge but we saw no reason to interfere with his finding as the evidence of PW7 was fully supported by that of PW6 who was the conductor of the bus. This witness gave evidence as to the examination of passengers and the arrest of the appellant by Corporal Ayob in the bus. There is nothing in the evidence adduced in this case which could render these two witnesses as unworthy of credit.

The only point raised in the appeal which ought to be dealt with and for which we reserved our decision is a highly technical point of law which, counsel for the appellant told us, was raised by him twice in High Court at Penang and once in High Court at Alor Star, and each time he was overruled. He said that this is the first time that he has the opportunity to raise the point before the Federal Court. The submission is that despite section 9(1) of the Emergency (Essential Powers) Act, 1979, the Essential Security Cases Regulations, 1979 as amended [P.U.(A) 320/79 and P.U.(A) 362/79] are still not validated. Parliament failed in its efforts to revive these regulations, because the expression "Every Subsidiary Legislation" used in section 9(1) of the Act must have the same meaning as defined in section 3 of the Interpretation Act No. 23 of 1967, i.e.

> "any proclamation, rule, regulation, order, notification, by-law or other instrument made under any Act, Enactment, Ordinance or other lawful authority and having legislative effect;"

Thus when section 9(1) of the Emergency (Essential Powers) Act, 1979 enacts that "Every subsidiary legislation . . . shall be valid," only those having the force of law is validated by the section. And as the Essential Security Cases Regulations were not made by lawful authority nor having the force of law by virtue of the Privy Council's ruling in *Teh Cheng Poh* v. *Public Prosecutor*,[1] they are not within the expression "Every subsidiary legislation" in section 9(1) of the Act, and therefore not validated.

This exercise in legal mathematics was not dealt with by the Federal Court in *Teh Cheng Poh* v. *Public Prosecutor*[2] nor in *Phang Chin Hock* v. *Public Prosecutor*.[3] In the *Teh Cheng Poh's* case the Lord President only dealt with the question of the inconsistency raised by Mr. Karpal Singh of subsection (1) of section 9 with sub-section (3) of the same section, whilst the *Phang Chin Hock's* case merely dealt with the question of the invalidity of the Act on the ground of its being inconsistent with the basic structure of the constitution. Thus the question whether or not section 9(1) revives the Essential Security Cases Regulations, having regard to the definition of subsidiary legislation in the Interpretation Act, still remains open.

The crux of the submission, it seems to us, is whether Parliament intended the expression "every subsidiary legislation" in section 9(1) of the Act to have the meaning assigned to the expression "subsidiary legislation" in the Interpretation Act. If we accept that the expression has the same meaning it means that the Act is validating something which is already validly done and cannot validate what was not validly done. To us this is absurd and we cannot attribute such exercise in futility to Parliament. For this purpose we set below section 9(1) of the Emergency (Essential Powers) Act

> "Every subsidiary legislation whatsoever made or purporting

to have been made under the Emergency (Essential Powers) Ordinance, 1969, (hereinafter in this Act referred to as "the Ordinance") on or after February 20, 1971, shall be valid and have effect as if the said subsidiary legislation has been made under the appropriate provision of this Act and shall be deemed to have come into force from the date on which the subsidiary legislation came into force or purported to have come into force under the Ordinance, and shall be read with all such modifications as may be necessary to construe such subsidiary legislation as having been made under this Act."

It is clear that the expression "every subsidiary legislation" in section 9(1) of the Act is not intended to include a general species, but limited to a particular kind. This expression is amply qualified by the words "whatsoever made or purporting to have been made under the Emergency (Essential Powers) Ordinance, 1969 on or after February 20, 1971." This qualifying phrase clearly shows that Parliament did not intend to import the definition of "subsidiary legislation" in the Interpretation Act into the section. The qualifying phrase refers to all regulations which purported to have been made under the Emergency (Essential Powers) Ordinance, 1969 being regulations which were struck down by the Privy Council in *Teh Cheng Poh's* case.[2] These regulations must necessarily include the Essential Security Cases Regulations which are therefore validated by section 9(1) of the Act. There is no question as to the power of Parliament to pass a validating Act, as this is succintly stated by the Lord President in *Teh Cheng Poh* v. *Public Prosecutor*[2] as follows:—

"The regulations having been ruled to be *ultra vires*, it is open to Parliament to validate them and further, to validate them with retrospective effect. With respect, we agree with the [following] statement of the Indian Supreme Court at page 908 in *Rai Ramkrishna* v. *The State of Bihar* [1964] 1 S.C.R. 897:"

We therefore feel that no more attempt should be made by counsel to raise the point in other High Courts.

In our view, there is no merit in the point raised and hence we dismiss the appeal.

Appeal dismissed.

Solicitors: *Subash Chandran.*

ALWEE v. LAI KONG FOOK & ORS.

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Salleh Abas F.JJ.) April 1, 1981]

[Ipoh — Federal Court Civil Appeal No. 130 of 1980]

Practice and Procedure — Appeal — Appeal on question of facts. — Application for amendment of statement of claim.

In this case the appellant appealed against the decision of the High Court reported in [1980] 2 M.L.J. 258. The appeal was on facts but at the hearing of the appeal the appellant also applied to amend the statement of claim.

Held: (1) as the findings of the learned trial judge were of pure facts, the Federal Court ought not to differ;

(2) the appellant could not hope to succeed even if the amendments were allowed, and for that reason the application to amend the statement of claim must be refused.

Cases referred to:-

(1) *Ong Chat Pang & Anor.* v. *Valliappa* [1971] 1 M.L.J. 224.

(2) *Oh Hiam & Ors.* v. *Tham Kong* [1980] 2 M.L.J. 159.

(3) *Chow Yee Wah* v. *Choo Ah Pat* [1978] 2 M.L.J. 41.

(4) *S. Soonaratnam & Anor.* v. *S. Ramalingam* [1981] 1 M.L.J. 24.

(5) *Tindok Besar Estate Sdn. Bhd.* v. *Tinjar Co.* [1979] 2 M.L.J. 229.

(6) *Curran* v. *William Neill & Sons (St. Helens) Ltd.* [1961] 3 All E.R. 108.

FEDERAL COURT.

J.R. Devadas (*Paramjit Singh* with him) for the appellant.

Colin Clark for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): This appeal is from the dismissal by the High Court at Ipoh (Abdoolcader J.) of a claim for specific performance of an oral agreement of sale of a house which the appellant was at all relevant times occupying as a tenant of the 1st and 2nd respondents (the houseowners).

The issues raised were clearly issues of pure facts and indeed, the appellant's then counsel in framing the issues in the case admitted so. In his view, with which the defendants' counsel and the court agreed, the appellant must establish, on a balance of probabilities, the existence of an oral agreement of sale which is legally binding on the parties and since the premises had been sold, whether the 3rd defendant, the subsequent purchaser of the premises, had notice of prior sale to the appellant. Counsel conceded that if he failed to establish the existence of the oral agreement of sale, the appellant would lose his whole case.

The allegations on which the appellant based his claim were given in his statement of claim as the payment of a deposit of $1000 during 1973, in consideration of the houseowners' agreement to sell the premises to him for $46,000. He did not allege any date set for completion. In consideration of this promise, he expended some $50,000 on the premises for the business of a restaurant and coffee-shop. In May 1976, he learnt from the 3rd respondent that the houseowners were about to sell the premises to him. He then advised the intended purchaser of his prior claim. When the houseowners notified him of this sale in August 1976, he took action. He claimed he was ready able and willing to complete, but he did not say when.

His statement of claim stood unamended at all times. No further and better particulars were sought from him, but in taking advantage of the vagueness of his statement of claim to roam at large, he fell into the not unusual error of departing seriously from his pleadings, when he came to give evidence, with serious consequences to his credibility.

If we do not now refer to the evidence in any detail, it is only because the trial judge had done so in as detailed and critical examination of the entire case as it has been our pleasure to read. But briefly, the trial judge found that the appellant had repeatedly changed his evidence as to the dates of the tenancy or of the offer to sell the premises to him, whether the oral agreement to sell the premises to him was made with the houseowners or with one Ah Pin and whether the renovations to the premises were made before or after the agreement to sell. The trial judge